Polymark Corporation *and* International Union of Electronic, Electrical, Salaried Machine and Furniture Workers, AFL–CIO, and its Local 795 *and* Robert J. Mohat. Cases 9–CA–28091, 9–CB–7783–1, and 9–CB–7783–2

September 1, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX, LIEBMAN, HURTGEN, AND BRAME

On September 30, 1992, Administrative Law Judge Karl H. Buschmann issued the attached decision. The Respondents and the Charging Party each filed exceptions and a supporting brief. The General Counsel filed limited exceptions and a supporting brief. The Respondent Union filed an answering brief in response to the Charging Party's exceptions and to the General Counsel's limited exceptions. The Charging Party filed an answering brief to the Respondents' exceptions and a brief in reply to the Respondent Union's answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision, and to adopt the recommended Order as modified and set forth in full below.

This case presents several issues concerning the enforcement of a union-security clause in the collective-bargaining agreement between the Respondent International Union of Electronic, Electrical, Salaried Machine and Furniture Workers, AFL–CIO (IUE), and its Local 795 (jointly referred to as the Union) and the Respondent Polymark Corporation (the Employer). Specifically, we must review the judge's conclusions that the union-security provision was not unlawful on its face; that the Respondent Union violated Section 8(b)(1)(A) and (2) of the Act by failing to honor Charging Party Robert Mohat's request for an immediate dues reduction after he resigned from the Union, and by failing to advise unit employees about their rights under the union-security clause; and that the Respondent Employer violated Section 8(a)(1), (2), and (3) of the Act by failing to honor Mohat's revocation of his dues-checkoff authorization after he resigned from the Union.

Since 1981, the Employer and the Union have been parties to successive collective-bargaining agreements containing union-security and dues-checkoff clauses. The relevant provision of the 1990–1993 agreement required as a condition of employment that nonmember unit employees "become and remain members in good standing of the Union." The article also provided that, upon the receipt of a duly executed authorization-assignment, the Employer would "deduct . . . all established monthly dues, initiation fees, and uniformly levied assessments of the Union . . . and remit such deductions to the Union."

Charging Party Mohat has worked for the Employer since November 4, 1986. He joined the Union as a full member and executed a checkoff authorization that stated:

AUTHORIZATION & ASSIGNMENT

> You are hereby authorized and directed to deduct from my wages my membership dues and initiation fees which shall be remitted by you to International Union of Electrical, Radio and Machine Workers AFL–CIO–CLC, Local 795 in accordance with the applicable collective bargaining agreement.
>
> This authorization shall be irrevocable until a date one year from the effective date hereof or until the date on which the current collective bargaining agreement between my employer and IUE–AFL–CIO–CLC and /or its Local is terminated, whichever is earlier. I agree and direct that this Authorization and Direction shall be automatically renewed, and shall be irrevocable for successive period of one (1) year each from the effective date hereof, or for the period of each succeeding applicable collective bargaining agreement between my employer and IUE–AFL–CIO–CLC and/or its local, postmarked not more than twenty (20) days and less than (10) days prior to the expiration date of each one-year period, or the termination date of each applicable collective bargaining agreement between my employer and IUE–AFL–CIO–CLC and/or its Local, whichever date is earlier.

In August 1990, Mohat read a newspaper account of *Communications Workers v. Beck*, 487 U.S. 735 (1988), concerning the right of nonmember employees subject to a union-security provision to object to a union's expenditure of their dues for nonrepresentational activities. Thereafter, while still a union member, Mohat made several attempts to gain information about how the Union was spending his dues. A September 9 letter from Mohat to the International Union's treasurer requested a rebate of all previously paid dues not specifically used to cover collective-bargaining costs and a written statement of the exact percentage of union dues needed for collective-bargaining costs.

By letter dated October 17, the Union denied Mohat's request for a refund. The letter informed him that *Beck* did not apply to union members. It further stated that the

[1] The Charging Party has requested oral argument. The request is denied as the record and briefs adequately present the issues and positions of the parties.

[2] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Union has an established procedure whereby a nonmember could, in April of each year, request a reduction in the amount of fees paid to the Union. Finally, the letter noted that the procedure for filing a dues objection had been published annually in the March edition of the "I.U.E. News." Mohat testified that he had never received copies of this newsletter.

Mohat sent another letter to the Union on November 9. In this letter, he resigned his membership, alleged the illegality of the parties' union-security clause, and stated his intent to file unfair labor practice charges. Expressly referring to *Beck*, he also objected to the payment of money to the Union for nonrepresentational purposes.

A November 19 letter from the Union advised Mohat that he was still obligated under the union-security clause to pay "a sum equal to union dues." It also reminded Mohat about established procedures for a nonmember to raise a *Beck* objection during the April window period. The letter did not describe the procedures, but it noted that they would be published in the "IUE News" before April 1991.

Mohat also mailed a letter to the Employer on November 9. He sought immediate revocation of his dues-checkoff authorization. Shortly thereafter, the Employer's accountant advised Mohat that the Company would continue to withhold dues, but the money would be put into an escrow account until the controversy concerning the amount owed was settled.

1. The complaint alleged that the union-security clause applicable to Mohat and fellow unit employees was unlawful on its face because it required membership in good standing and failed to state expressly their rights, principally defined in *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), and in *Beck*, to be other than full union members and to pay less than full union dues and fees. The judge recommended dismissal of this allegation.

We agree with the judge's recommendation. The union-security clause tracks the provisions of Section 8(a)(3) of the Act authorizing unions and employers to negotiate agreements that require "membership" as a condition of employment for all unit employees. In its recent decision in *Marquez v. Screen Actors Guild*, 525 U.S. 33 (1998), the Supreme Court unanimously held that a union does not violate its duty of fair representation merely by negotiating agreements that track the language of Section 8(a)(3), without fully explaining, in such agreements, *General Motors* and *Beck* rights. The Court explained that, by tracking the statutory language, a union-security clause incorporates all of the legal rights and refinements that have become associated with that language under *General Motors* and *Beck*. In light of the Supreme Court's decision in *Marquez*, we affirm the judge's finding that the union-security clause at issue in this case is not facially invalid.[3]

2. The judge seems to have found that the Union unlawfully failed to give sufficient separate notice of *Beck* rights to Mohat and, perhaps, to other unit employees. The complaint itself does not allege a notice violation in the implementation of the union-security provision. It alleges only that the Respondent Union violated the Act by maintaining a facially unlawful union-security clause and by failing to honor Mohat's request for a reduction in dues at the time of his resignation from union membership. Although such allegations would in certain circumstances be sufficient to warrant the finding of notice violations without regard to the precise language of a union-security clause,[4] if fully litigated, the course of proceedings in this case preclude such a finding. At the hearing, the General Counsel expressly limited the *Beck* issues to the facial validity of the contract and the "Respondent Union's failure to accord. Mohat his *Beck* rights immediately upon request after his resignation from membership."

Furthermore, the General Counsel does not challenge the general adequacy of the Union's annual *Beck* notice in its newsletter. Although the judge found that Mohat never received copies of this newsletter, there is no evidence that his failure to receive notice of *Beck* rights through this medium was the result of arbitrary, bad faith, or discriminatory conduct by the Union.[5] Accordingly, we shall reverse the judge's finding that the Union violated Section 8(b)(1)(A) and (2) by failing to advise Mohat that the only condition of employment was the payment of dues and fees relating to representational purposes.

3. The judge held that the Respondent Employer violated Section 8(a)(1), (2), and (3) of the Act by failing to honor Mohat's revocation of his dues-checkoff authorization. Relying on *Electrical Workers IBEW Local 2088 (Lockheed Space Operations)*, 302 NLRB 322 (1991), the judge found that Mohat's authorization encompassed only the period during which he was a union member.

Lockheed, however, did not involve an employee subject to a valid union-security clause. In fact, the Board there expressly left open the question whether a union could lawfully insist upon continued checkoff of dues as to an employee who resigned union membership and

[3] Accord: A*ssn. for Retarded Citizens (Opportunities Unlimited of Niagara)*, 327 NLRB 463, 465 (1999); *Paperworkers Local 987 (Sun Chemical Corp. of Michigan)*, 327 NLRB 1011, 1012 (1999).

[4] See generally *California Saw & Knife Works*, 320 NLRB 224, 251–252 (1995), enfd. sub nom. *Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), cert. denied sub nom. *Strang v. NLRB*, 525 U.S. 813 (1998).

[5] Cf. *California Saw & Knife Works*, 320 NLRB at 251–252 (resolution of notice issue remanded to administrative law judge turns on reasonableness of unions' dissemination efforts, not on evidence of whether all employees actually received newsletter or read the notice of *Beck* rights in it).

attempted to rescind his checkoff authorization outside the window period, but who continued to owe some amount of union dues pursuant to a union-security clause.[6] Subsequent to the judge's decision here, the Board answered this open question in *Auto Workers Local 1752 (Schweizer Aircraft)*, 320 NLRB 528 (1995), affd. sub nom. *Williams v. NLRB*, 105 F.2d 787 (2d Cir. 1996). The Board held that "resignation of membership by an employee who is obligated to pay dues under a lawful union-security clause does not privilege the employee to make an untimely revocation of his checkoff authorization, and therefore a union's efforts aimed at continued enforcement of that checkoff after the employee's resignation do not violate the Act." 320 NLRB 528, supra at 531.

Schweizer Aircraft is controlling here with respect to the legality of the Respondent Employer's failure to honor Mohat's untimely postresignation attempt to revoke his dues-checkoff authorization.[7] In accord with the analysis set forth in *Schweizer Aircraft*, the Employer did not violate the Act as alleged in the complaint.

Our dissenting colleague, in disagreement with *Schweizer*, argues that the word "membership" in a checkoff authorization must refer to full union membership, as opposed to the more restricted meaning of union "membership" as that term is used in the proviso to Section 8(a)(3) of the Act and in contractual union security clauses. In *Marquez v. Screen Actors Guild*, supra, the Supreme Court held that, in the proviso and in union-security clauses tracking its language, the word "membership" incorporates the glosses of case law, restricting it to the obligation to pay dues and fees "for representational activities." In a unit covered by a valid union security clause, an employee's resignation from the union and filing of a *Beck* objection would not relieve him of that obligation. We see no reasonable basis for our dissenting colleague's contention that, in using the term "membership dues" in Section 302(c)(4) of the Labor Management Relations Act, Congress intended something different from what was intended in Section 8(a)(3) of the NLRA. "Membership dues" refers to whatever may lawfully be charged as dues. In the case of both the checkoff and the dues obligation imposed by the union-security clause, an employee's resignation places him in a position, under *Beck*, to claim the right to pay dues only for the support of the union's "representation activities." But, just as his resignation does not nullify his dues obligation in toto, so his resignation should not nullify his checkoff authorization.

We emphasize that we are not holding that an employee must remain on checkoff for full union dues until the next open period. After an employee has perfected an objection under *Beck* to the payment of nonrepresentational expenses, a union may lawfully seek enforcement of the checkoff only for an amount equivalent to an employee's share of representational expenses. It is the union, however, not the employer, that bears the onus for responding initially to the objection. Accordingly, an employer does not violate the Act by continuing to deduct an amount equivalent to full union dues after an employee has perfected a *Beck* objection until such time as the union informs the employer of the reduced amount owed for representational expenses.[8]

4. The judge found that Mohat's resignation from the Union and his *Beck* objection obligated the Union to honor his objection within a reasonable time. Citing *Pattern Makers v. NLRB*, 473 U.S. 95 (1985), the judge further found that the Union's failure to honor Mohat's November objection because it occurred outside of the April window period conflicted with the right to be free to resign from union membership.

The judge's conclusion accords with the Board's subsequent disposition of the same issue in *California Saw & Knife*. The Board there held that a window period for filing *Beck* objections, as applied to individuals who resign their union membership after the expiration of an annual window period, operates as an arbitrary restriction on the right to be free to resign from union membership because employees are effectively compelled to pay the equivalent of full dues and fees even though they are no longer union members. 320 NLRB at 236. The Board concluded that, in light of the fundamental labor policy of "voluntary unionism" emphasized by the Court in *Pattern Makers*, a window period for filing objections, as applied to employees who resigned their union membership after its expiration, constitutes arbitrary conduct violative of the duty of fair representation.[9]

[6] 302 NLRB at 329 fn. 26.

[7] Chairman Truesdale and Members Fox, Liebman, and Hurtgen agree that *Schweizer Aircraft* is controlling in the situation of an untimely postresignation attempt to revoke a dues checkoff. For the reasons set forth in their partial dissent, Members Fox and Liebman would also find no violation here because they would find that Mohat's objection attempt was itself untimely and therefore ineffective.

In *Schweizer Aircraft*, Chairman Truesdale noted that he would construe the charging party's premature notice of revocation in that case as an ongoing request to be held in abeyance until such time as it may have been submitted in accordance with the limitations set forth in the authorization. 320 NLRB at 532 fn. 14. Consistent with this position, he would likewise construe Mohat's untimely revocation as an ongoing request. However, he notes that Polymark's failure to honor Mohat's premature revocation at the nearest period for revocability was not alleged or litigated as a separate violation of the Act.

[8] Members Fox and Liebman subscribe to everything in the foregoing paragraph except that, for the reasons stated in their dissent, they would find that no reduction in either dues or the amount of checkoff would be required until the next window period for filing *Beck* objections.

We note that the Employer here placed Mohat's dues in escrow after receiving notice from him of his resignation and *Beck* objection. No issue is raised and we do not pass on the question of whether the Employer was required or permitted to follow this procedure.

[9] Although the Seventh Circuit held in favor of a union with respect to the enforceability of a similar window period in *Nielsen v. Machinists Local 2569*, 94 F.3d 1107, 1116–1117 (1996), the Board was not a

Under *California Saw*'s analysis of the window period issue, the Respondent Union's imposition of a window period limitation on the filing of *Beck* objections by employees who have recently resigned is violative of the duty of fair representation because it operates as an arbitrary restriction on the right to resign from union membership.[10] Accordingly, the Respondent Union in this case unlawfully refused to honor Mohat's attempt to file a *Beck* objection, and it thereby violated Section 8(b)(1)(A) of the Act.[11]

AMENDED REMEDY

Having found that the Respondent Union violated Section 8(b)(1)(A) of the Act by restricting the submission of dues objections of recently resigned union members to the annual April window period, we shall order the Respondent Union not to enforce the policy restriction as currently written against dues objections of union member resignees. Further, we shall order the Respondent Union to amend their policy to make it clear that employees who resign from the Union may file objections to the collection of fees for nonrepresentational expenses for a reasonable time after their resignation of not less than 30 days. We shall further order the Respondent Union to accept from employee Robert Mohat the reduced dues and fees for the period he was or should have been a perfected objector.

ORDER

The National Labor Relations Board orders that the Respondent, International Union of Electronic, Electrical, Salaried Machine and Furniture Workers, AFL–CIO, and its Local 795, their officers, agents, and representatives, shall

1. Cease and desist from

(a) Preventing employees in the Polymark Corporation collective-bargaining unit who have resigned from the Union from filing objections to the payment of fees for expenditures of the Union not germane to the collective-bargaining process for a reasonable time after their resignations.

(b) Collecting or attempting to collect fees from objecting nonmembers which are attributable to nonrepresentational expenditures.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize employee Robert Mohat as an objecting nonmember as of the effective date of his resignation.

(b) Accept from Mohat the reduced dues and fees for the period he was or should have been a perfected objector.

(c) Amend its policy to make it clear that employees who resign from the Union may file objections to the collection of fees for nonrepresentational expenses for a reasonable time after their resignation.

(d) Within 14 days after service by the Region, post at its business offices and local meeting halls copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent Unions' authorized representatives, shall be posted by the Respondent Unions and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent Unions have taken to comply.

MEMBERS FOX and LIEBMAN, dissenting in part.

We join all parts of the majority's decision but one. Unlike our colleagues, we would not find that the Respondent Union violated its duty of fair representation by refusing to honor Charging Party Robert Mohat's November 1990 *Beck*[1] objection because it was not filed during April pursuant to the Union's established procedures.

In *California Saw & Knife Works*,[2] the Board held that a union that has a "window period" for filing *Beck* objections violates its duty of fair representation by applying the window period to employees who resign their union membership after the window period expires. The Board reasoned that requiring such employees to continue to

party to that proceeding. The Seventh Circuit subsequently deferred to the Board's administrative expertise and specifically enforced as a reasonable statutory interpretation the finding of a window period violation in *California Saw*. 133 F.3d at 1019–1020.

[10] Although Members Fox and Liebman would overrule *California Saw* on this issue, and Member Brame would find a violation on different grounds, *California Saw* remains controlling precedent in the absence of a single-majority supported rule to replace it.

We do not agree with our colleague that an "overcharge" to a *Beck* objector is a "fine or penalty." These terms generally connote internal union discipline. The moneys involved herein are union-security dues. They are privileged by the union-security provisos to Sec. 8(a)(3) and Sec. 8(b)(2), except to the extent that they are used for nonrepresentational purposes.

[11] We shall reverse the judge and dismiss the 8(b)(2) allegation against the Union, however, in the absence of evidence that the Union sought to "cause or attempt to cause [Polymark] to discriminate against an employee in violation of subsection 8(a)(3)" with respect to any employee.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] *Communications Workers v. Beck*, 487 U.S. 735 (1988).

[2] 320 NLRB 224 (1995), enfd. sub nom. *Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), cert. denied sub nom. *Strang v. NLRB*, 525 U.S. 813 (1998).

pay full dues and fees until the next window period operates as an arbitrary restriction on their right to resign from union membership.[3] Our colleagues adhere to that view in finding the violation here.

Contrary to the majority, we find no reasoned support for the Board's ruling on this issue in *California Saw*. To begin with, notwithstanding the Board's ipse dixit pronouncement in that case, it is simply not true that requiring employees to object during an annual window period restricts their right to resign. Under the Board's decision in *Pattern Makers*,[4] employees may resign their union membership at any time, for any reason. The existence of a window period in which employees who are not members of the union may file a *Beck* objection in no way limits that right. The fact that an employee may have to wait some period of time after resigning from the union to obtain a reduction in the fees she is charged as a nonmember may make resignation less *attractive* to the employee at that particular time, but that hardly means that the employee is in any sense being compelled to remain a member of the union against her will.

Second, the majority's rule is inconsistent with the duty of fair representation as it has been consistently interpreted. As the Board recognized in *California Saw*, in construing the duty of fair representation, the Board and the courts must allow a union a "wide range of reasonableness . . . in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."[5] Accordingly, any assessment of the validity of a window period requirement must take into account unions' legitimate interests in administrative efficiency and simplicity.

The Seventh Circuit Court of Appeals in *Nielsen v. Machinists*[6] did just that, and found that a union's use of a window period in circumstances similar to those presented here did not violate its duty of fair representation. The court agreed with the union in that case that the use of a window period was "a reasonable administrative device that helps the union to process its dues objector claims and to keep its annual budget straight."[7] The court noted that requiring unions to handle objections "on a rolling basis throughout the year" would raise administrative costs and complicate unions' efforts to devise annual budgets for their nonrepresentational activities.[8] It held that "[n]othing in the NLRA or in *Beck* confers a right to instantaneous action, regardless of the administrative burden the union might bear in implementing these requests."[9] Other circuit courts of appeals have considered window periods and have come to the same conclusion. See discussion in *Nielsen*.

Our colleagues, however, give no weight to these important considerations. Instead, they focus entirely on the employee's desire to object at any time he pleases, and their only apparent reason for doing so lies in the mistaken belief that to do otherwise would impair the employee's right to resign from union membership. As the Seventh Circuit in *Nielsen* held, "Such exacting scrutiny is inconsistent with *Vaca*[10] and *O'Neill*,[11] which require us to uphold the union's actions as long as they fall within a generous range of reasonableness."[12] We agree with the court that

> It is not unreasonable for a union to require existing members or full fee nonmembers to voice their objections in a timely fashion, and to be aware that the price of not doing so will be to wait at most ten or eleven months before implementing their new status. Life is full of deadlines, and we see nothing particularly onerous about this one. When people miss the deadline for filing an appeal to this Court [or exceptions to the Board], their rights can be lost forever, not just for eleven months, but that does not make time limits for filing an appeal in violation of the law.[13]

In our view, then, window periods serve legitimate union administrative purposes. They do not unreasonably restrict employees' rights to file *Beck* objections, and do not in any sense impair their right to resign from union membership. We would, therefore, overrule *California Saw* insofar as it holds that a union may not lawfully refuse to honor *Beck* objections filed by employees who resign after the expiration of an annual window period, and we would dismiss the complaint altogether.

MEMBER HURTGEN, concurring.

I agree that the union-security clause is not unlawful on its face. However, contrary to the majority, I note that the clause does not track the statute. Rather, it reads in terms of "member in good standing" rather than "member." However, in the instant case, I note that there is no evidence of any Respondent constitution or bylaw, which defines "member in good-standing." If there were, and if the terms were defined in ways that go beyond the payment of dues and fees, I would consider whether the language of the union-security clause in that context was unlawful.

I agree that the forced collection of union dues for nonrepresentational purposes, after a nonmember has objected thereto, is a violation of the employee's Section

[3] 320 NLRB at 236, citing *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985).

[4] *Pattern Makers League*, 265 NLRB 1332 (1982), enfd. 724 F.2d 57 (7th Cir. 1983), affd. 473 U.S. 95 (1985).

[5] 320 NLRB at 229, quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

[6] 94 F.3d 1107 (1996).

[7] Id. at 1116.

[8] Id.

[9] Id.

[10] *Vaca v. Sipes,* 386 U.S. 171 (1967).

[11] *Air Line Pilots v. O'Neill*, 499 U.S. 65 (1991).

[12] 94 F.3d at 1117.

[13] Id. at 1116.

7 rights to refrain from supporting the union. I note, however, that the Supreme Court in *Beck* held that such conduct was a breach of the duty of fair representation. Accordingly, I conclude that such conduct is both a direct infringement of a Section 7 right and a breach of the duty of fair representation.

MEMBER BRAME, concurring in part and dissenting in part.

This case presents a situation in which a union-represented employee, Robert Mohat, wished to take control of his relationship with his bargaining representative[1] within the limits of the law. First, he wanted to end his unwilling financial support, pursuant to the collective-bargaining agreement's union-security clause, of union activities unrelated to collective bargaining. Mohat found that to do so he would have to resign from union membership, so he did. But Mohat had also learned that the financial burden of continuing to support activities that, under the law, could not be required of him would not end for about another 10 months. This restriction stemmed from a union rule designating a limited annual period, in this case a 1-month "window period," during which his union would accept his objection to paying dues in an amount exceeding that required for representational purposes. Further, Mohat wished to exercise control over the manner in which he remitted his dues, by voiding a dues-checkoff authorization[2] with his employer that, by its terms, was no longer enforceable after he had resigned from the Union. His employer, Polymark, refused to honor his revocation, and continued to withhold the full dues for a union of which Mohat was no longer a member. The allegations in the complaint before us, then, arose because, acting on his own, Mohat was unable promptly to effect his rights under the Act in either matter. The complaint alleges that the Union violated Sections 8(b)(1)(A) and (2) of the National Labor Relations Act[3] by refusing to reduce Mohat's financial obligation after he resigned from union membership.[4] The complaint further alleges that Polymark violated

[1] Named in the complaint are the "International Union of Electronic, Electrical, Salaried Machine and Furniture Workers, AFL–CIO, and its Local 795." For convenience, these entities will be referred to throughout as "the Union."

[2] A dues-checkoff system is a procedure under which an employer deducts union dues directly from the wages of a bargaining unit employee and remits them to the union. The Act permits such an agreement between an employee and his employer if certain conditions are met. See fn. 3, infra.

[3] 29 U.S.C.§ 151, Below are the provisions of the Act referred to in full or in relevant part:

> Section 7 (after Congress amended it in 1947 to embrace the right of employees to refrain from concerted activity, the provision reads):
>
> RIGHTS OF EMPLOYEES
>
> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8(a)(2) provides in relevant part:

> It shall be an unfair labor practice for an employer—
>
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.
>
> . . . .

Sec. 8(a)(3) provides in relevant part:

> It shall be an unfair labor practice for an employer—
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act . . .shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made . . . Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

Sec. 8(b) reads, in pertinent part:

> It shall be an unfair labor practice for a labor organization or its agents
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein
>
> . . . .
>
> (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3).

Sec. 302(a)(4), which enables unions and employers to negotiate dues-checkoff authorization provisions in collective-bargaining agreements, provides as follows:

> It shall be unlawful for any employer . . . to pay, lend, or deliver . . . any money or other thing of value—to any labor organization . . . [except] with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner.

[4] The complaint also alleged that the Union violated Sec. 8(b)(1)(A) and (2) and the Employer violated Sec. 8(a)(3) and (1) by maintaining a collective-bargaining agreement with a union-security clause requiring employees to be members of the Union in good standing. Like my colleagues, I would dismiss this allegation under *Marquez v. Screen Actors Guild*, 525 U.S. 33 (1998), wherein the Supreme Court upheld the facial validity of a similar clause.

Sections 8(a)(1), (2), and (3) of the Act by refusing to honor Mohat's revocation of his dues-checkoff authorization. In my view, both the Employer and the Union violated the Act, to the extent discussed below, in their treatment of Mohat's claims.

Mohat's rights with respect to his union-security obligations arise from the most fundamental precepts of labor law, as interpreted by Supreme Court decisions defining the relationship between a union and an employee under the Act. In *NLRB v. General Motors Corp.,*[5] the Supreme Court recognized Mohat's right to resign formal union membership, even though the Union and Polymark had negotiated a union-security clause requiring "membership in good standing." The Court further limited Mohat's financial obligation to the Union to a service fee that did not include funds used to support activities not related to the Union's role as collective-bargaining agent under *Communications Workers v. Beck.*[6] In that case, the Supreme Court held that although Section 8(a)(3) of the Act permits a union and an employer to agree that all unit employees shall pay dues and fees regardless of formal membership, a union's expenditure of such funds collected from objecting nonmembers on activities unrelated to collective bargaining violates the union's duty of fair representation.[7]

I.

The Union represents a unit of production and maintenance employees at Polymark, a Cincinnati, Ohio manufacturer of silk-screen emblems. The Union and Polymark had negotiated a collective-bargaining agreement with a union-security clause and dues-checkoff authorization.[8] Mohat went to work in the bargaining unit at Polymark in 1986. At the time he was hired, Polymark's president, Dale Vollmer, told Mohat that he was to join the Union and to authorize dues checkoff. Mohat did so. In August 1990,[9] he learned, through a newspaper article, of represented employees' rights under *CWA v. Beck*. Mohat sought to exercise those rights immediately, first by asking Sheila Madden, his shop steward, about how his dues broke down between representational and nonrepresentational matters. Madden was unable to help him. In late August or September, Mohat next called the Union, seeking without success the same information. Mohat then wrote to the Union on September 9, requesting a breakdown of his dues between representational and nonrepresentational activities as well as a refund of dues not used for collective bargaining. By letter dated October 17, Edward Fire, the International Union's treasurer, denied the refund request, because *Beck* rights do not apply to members. Fire informed Mohat, however, that in April 1991, six months hence, *nonmembers* could request a dues reduction, to run from "the succeeding June through May of the following year." Thus, the earliest time that Mohat could realize his dues objection was approximately 10 months after he began his efforts

[5] 373 U.S. 734 (1963). *General Motors* described the "membership obligation" a bargaining unit employee owed his bargaining representative as membership "whittled down to its financial core." Id. at 742.

[6] 487 U.S. 735 (1988).

[7] The Court reasoned that its decision in *Machinists v. Street,* 367 U.S. 740 (1961), which made essentially the same holding under the Railway Labor Act ((RLA), 45 U.S.C. § 151, et seq.), is controlling for cases arising under the NLRA. The Court found that Sec. 2, Eleventh of the RLA and Sec. 8(a)(3) are identical in all material respects. The Court observed that "only the most compelling evidence could persuade us that Congress intended the nearly identical language of these two provisions to have different meanings." 487 U.S. at 754.

The duty of fair representation is a court-devised legal principle, originally arising in cases under the RLA, which affords employees direct access to the federal courts for claims against their union. See, e.g., *Steele v. Louisville & Nashville Railway Co.*, 323 U.S. 192 (1944). As succinctly formulated by the Supreme Court, the duty of fair representation states that the union, as the exclusive representative of all employees in a unit, owes each employee a duty to exercise honesty of purpose and good faith in statutory dealings. A union breaches its duty of fair representation through conduct that is "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). *Vaca v. Sipes* arose under Sec. 301 of the Labor Management Relations Act, which accords federal courts jurisdiction over suits by and against labor organizations, including some by employees. A Sec. 301 suit does not involve a finding that the union has violated the Act and does not consider whether a union has "restrained or coerced" an employee within the meaning of Sec. 8(b)(1)(A).

The Board concluded that the duty of fair representation could be enforced through an unfair labor practice proceeding alleging a violation of Sec. 8(b)(1)(A) of the Act in *Miranda Fuel Co.*, 140 NLRB 181, 185 (1962), enf. denied on other grounds 326 F.2d 172 (2d Cir. 1963). The Board derived the right from the Sec. 7 right to "bargain collectively through representatives of one's own choosing" and concluded that Sec. 8(b)(1)(A) "prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair." "Although there is no explicit statutory requirement of 'fair representation,' the Board and the courts have declared a violation of the duty to be a violation of Sec. 8(b)(1)(A)." *NLRB v. Teamsters Local 5*, 778 F.2d 207, 213 (5th Cir. 1985), and cases cited therein.

[8] The text of the union-security clause and the dues-checkoff authorization in the relevant collective-bargaining agreement between Polymark and the Union are as follows:

> Section 1. It shall be a condition of employment that all employees of the Company covered by this Agreement who are members of the Union in good standing on the effective date of this Agreement shall, [sic] remain members in good standing and those who are not members on the effective date of this Agreement, shall, on the sixty-first day following the effective date of this agreement, become and remain members in good standing of the Union. It shall also be a condition of employment that all employees covered by this Agreement and hired after its effective date shall, on the sixty-first calendar day following the beginning of such employment, become and remain members in good standing in the Union.
>
> . . . .
>
> Section 2. Upon receipt of a duly executed authorization-assignment, the company agrees to deduct from the pay all [sic] employees covered by this agreement all established monthly dues, initiation fees, and uniformly levied assessments of the Union. It is further agreed that the Company shall remit such deductions to the Union prior to the end of the month for which the deduction is made. All authorizations shall be voluntarily signed by the employees.

[9] Unless otherwise noted, all subsequent dates shall be in 1990.

to secure his *Beck* rights. Fire also informed him that the Union had published this information in its newsletter.[10]

Mohat resigned from the Union by letter dated November 9, and instructed the Union to put his *Beck* rights into effect immediately. On the same day, Mohat sent Polymark a copy of this letter, with a cover letter revoking his checkoff authorization, noting that the authorization form "only allows you to deduct monies from my pay for 'membership dues and initiation fee.' As I am no longer a member of the Union, I owe the Union no 'membership dues.'"

On the day Polymark received Mohat's letter, Jim Henson, Polymark's accountant, orally acknowledged his letters and informed him that the Company would continue withholding full dues, as the Union had not authorized it to reduce that amount, and that it would place the money in escrow pending resolution of the dispute. According to Mohat's testimony, Henson indicated that Polymark preferred legal difficulties with him to any with the Union.

By letter dated November 19, Fire then told Mohat that although he had resigned, he was still responsible for paying an amount equal to normal dues and fees and reminded him of the objection procedures outlined in its previous letter.

In December, with both bargaining representative and employer ranged against him, a frustrated Mohat filed an unfair labor practice charge and the Union filed a grievance with Polymark for failing to pay Mohat's dues. Polymark denied the grievance, and the instant proceeding resulted from the charge.

II.

The judge found that the Union's failure to reduce his financial obligation to his fair share of such expenses violated Section 8(b)(1)(A) and (2) of the Act.[11] With respect to Polymark, the judge found that its failure to give effect to Mohat's checkoff revocation violated Sections 8(a)(1), (2),[12] and (3) and ordered Polymark to honor the checkoff revocation and to refund dues and fees collected thereafter.

My colleagues have found that the Union unlawfully refused to accord Mohat his *Beck* rights immediately upon his assertion of them, but solely on the grounds that he effectively resigned from the Union notwithstanding the window period. They rely on the Board's previous decision *California Saw & Knife Works*.[13] They order the Union to recognize Mohat as an objecting nonmember as of the date of his objection, accept from him the reduced dues and fees of an objector, and amend its policy to clarify that employees who resign union membership may file *Beck* objections for a reasonable time after resignation.

My colleagues have also reversed the judge and dismissed the allegation against the Employer under the rule announced in *Auto Workers Local 1752 (Schweizer Aircraft)*,[14] in which the Board, with former Member Cohen dissenting, held that a dues-checkoff authorization survives resignation when an employee is covered by a valid union-security clause.

III.

While I agree that the Union violated the Act in failing to follow Mohat's instructions respecting his dues objection promptly, I base my view on a very different reading of the law from that of my colleagues. Once an employee has resigned from the union, the union may not collect funds in amounts greater than those allowed under *Beck*. Therefore, the collection of such amounts, whether for 1 month or for 11 months because of a "window period," is prohibited by the Act, as violations of Section 8(b)(1)(A)'s prohibition against "restrain[t] or coerc[ion][of] employees in the rights guaranteed in Section 7." Well-settled legal precedent supports this view, as does simple logic. On the one hand, if such compelled overcharges are viewed as equivalent of the dues and fees paid by members, then regardless of the reasons a union may give for the imposition of a window period, the union collecting the overcharge violates the employee's fundamental Section 7 right to refrain from "assist[ing]" a labor organization. On the other hand, if overcharges[15] are viewed as something other than lawful dues, they constitute a fine or discipline that coerces and

[10] Mohat testified that he had never received the newsletter. In its brief, the Union concedes the veracity of Mohat's statement that he had never received the newsletter.

Mohat also unsuccessfully sought similar information from Polymark. The Supreme Court, however, has never found that an employer has any obligation to provide employees with information regarding their rights under union-security clauses.

[11] The judge also found that the Union's failure to inform Mohat that the sole condition of employment is the payment of fees for representational expenses violated Sec. 8(b)(1)(A). I agree with my colleagues' dismissal of this finding, solely on the basis that it was not alleged in the complaint or litigated at the hearing.

I also agree with my colleagues' dismissal of the 8(b)(2) allegation against the Union in the absence of evidence that the Union sought to "cause or attempt to cause [Polymark] to discriminate against an employee in violation of subsection (a)(3)" with respect to any employee.

[12] The Employer argues in pertinent part that it did not violate Sec. 8(a)(2) because it placed any dues of Mohat's that could be disputed into an escrow account pending the resolution of a disagreement involving parties and issues other than those over which it had control. Thus, Polymark contends, it did not "contribute financial aid or other support" to a labor organization in violation of Sec. 8(a)(2). I find merit in Polymark's exception, and I would dismiss the 8(a)(2) allegation in light of Polymark's having placed the dues in escrow.

[13] 320 NLRB 224 (1995), enfd. sub nom. *Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), cert. denied sub nom. *Strang v. NLRB*, 525 U.S. 813 (1998). *California Saw & Knife* was the Board's first elucidation of its view that violating the rights accorded an employee under *Beck* was a breach of the union's duty of fair representation and a violation of Sec. 8(b)(1)(A). See fuller discussion, infra.

[14] 320 NLRB 528 (1995), affd. sub nom. *Williams v. NLRB*, 105 F.3d 787 (2d Cir. 1996).

[15] The term "overcharge" will be used herein to denote the amount of money in excess of the appropriate *Beck* service fee for objecting nonmembers that a union continues to exact after resignation and objection.

restrains the objecting nonmember under *Scofield v. NLRB*.[16]

Thus, because cases dealing with the lawfulness of a union's window period for dues objections under *Beck* involve the statutory prohibition against "restraint or coercion," I would hold that a union must accept and give immediate effect to *all* dues objections from *any* nonmember, at the election of the nonmember rather than at the convenience of the union.[17] In addition, I would require an employer to honor a nonmember's revocation of dues-checkoff authorization and a union to recognize this obligation on the part of an employer.

A careful reading of the Act and the case law indicates clearly that no clause of Section 7 can be stretched to endow a union or an employer with the right to require that the employee continue to pay fees the union may no longer legally demand or to bind a nonmember to one method of remitting dues. I find only one outcome in keeping with the Act's principles of employee freedom of choice. The discretion to join a union, to remain a member or to resign, to support every activity the union deems desirable or to limit support to the bargaining agent's statutory activities, remains vested always and entirely in the *employee*, not in the bargaining representative nor in the employer. Just as a union cannot restrict a member's right to resign,[18] no private restriction may be placed on a nonmember's right to control his relationship to his bargaining representative. Further, no party can hold an employee to a private contract, such as a dues-checkoff authorization, when the condition underlying that contract no longer exists. My reasons for these positions follow.

A.

First, a limit on a nonmember's right to assert *Beck* rights violates the bedrock principles of voluntary unionism and the concomitant right to refrain from union activity. As noted above, the majority finds that the Union in this case violated Section 8(b)(1)(A) based on the precedent set by the Board in *California Saw & Knife.* In that case, the Board faced the limited allegation that

> the window period is violative of Section 8(b)(1)(A) of the Act *solely* as applied to employees who resign their membership following the expiration of the January window period. The General Counsel reasons that a union member who resigns after the January window period has passed is compelled to wait until the following January to register a *Beck* objection. The General Counsel accordingly asserts that the window period impermissibly burdens the resignation rights of those individuals who resign their union membership following the window period.[19]

The Board agreed with the General Counsel and the judge, and found, in light of its duty to uphold the fundamental labor policy of voluntary unionism, that with respect to this small class of employee, the window period

> effectively operates as an arbitrary restriction on the right to be free to resign from union membership. [Citations omitted]. A unit employee may exercise *Beck* rights only when he or she is not a member of the union. An employee who resigns union membership outside the window period is thereafter effectively compelled to continue to pay full dues even though no longer a union member, and the window period in this circumstance operates as an arbitrary restriction on the right to refrain from union membership and from supporting nonrepresentational expenditures.[20]

The *California Saw* Board rightly relied on *Pattern Makers v. NLRB*.[21] The Supreme Court held there that Section 8(b)(1)(A) precluded a union from fining employees who resigned during a strike, despite a union bylaw prohibiting such resignations. The Court based its holding on the conclusion that reasonable limits on resignation were incompatible with Section 7's recognition of the right of employees to refrain from union activities, and fining an employee for resigning during a strike was thus a coercive act violative of Section 8(b)(1)(A). In *California Saw & Knife*, however, the Board merely stated, without explication, the principle that imposing a window period on newly resigned employees impeded their right to resign freely, but then found, with respect to that group of employees, that the imposition of a window period was arbitrary conduct that violated the union's duty of fair representation. In this last respect, the Board unquestionably strayed. Where statutory language clearly covers conduct in question, it is unnecessary to look to the duty of fair representation, a judicially derived doctrine. Thus, in *Pattern Makers,* the Supreme Court analyzed the union conduct at issue in terms of its propensity to restrain or coerce employees, not in terms of whether the union's conduct ran afoul of the duty of fair representation doctrine, which the Board had, in *Miranda Fuel Co.,* supra, recognized as a distinct violation of Section 8(b)(1)(A).[22]

This analysis arises from an important theme of labor history emerging since 1935: the transition from the closed shop and compulsory unionism under the Wagner Act to voluntary unionism after the 1947 Taft-Hartley amendments. This movement has been, for our pur-

[16] 394 U.S. 423 (1969).

[17] In this regard, we need not decide whether a union, which, for example, accepts new members only on the first of each month, may delay the effectuation of a requested reduction of dues similarly to the first of the month that next follows the request.

[18] *Pattern Makers v. NLRB*, 473 U.S. 95 (1985).

[19] 320 NLRB at 236.

[20] Id.

[21] 473 U.S. 95 (1985).

[22] See fn. 7, supra.

poses, primarily expressed in Taft-Hartley's amendments to Section 7 and to what is now Section 8(a)(3) and its addition of Section 8(b)(1)(A) to the Act, as well as in several Supreme Court cases applying these sections. Taft-Hartley amended Section 7, in relevant part, to add language recognizing employees' right to "refrain from any or all [concerted] activities"; and, as the Supreme Court commented in *Pattern Makers*, "[t]his general right is implemented by Section 8(b)(1)(A)."[23] Taft-Hartley's amendments to Section 8(a)(3) eliminated compulsory unionism by permitting only union-security agreements that did no more than require unit employees to pay dues or an equivalent service fee and removed union power under a closed shop to force a worker to abide by union rules or policies or lose his job. As the Court in *Pattern Makers* noted, "[f]ull union membership thus no longer can be a requirement of employment. If a new employee refuses formally to join a union and subject himself to its discipline, he cannot be fired. Moreover, no employee can be discharged if he initially joins a union, and subsequently resigns."[24]

In *Pattern Makers*, the Court linked its construction of Section 8(a)(3) permitting resignation at will to these developments in individual labor freedoms, and recognized that Section 8(b)(1)(A) was the practical tool that effectuated that freedom. As noted above, the Court held that Section 8(b)(1)(A) precluded a union from fining employees who violated a union bylaw by resigning during a strike. The Court saw that, although the bylaw called for fining employees, not discharging them, it was nonetheless coercive. "[A] union has not left a 'worker's employment rights inviolate when it exacts [his entire] paycheck in satisfaction of a fine imposed for working.' . . . Congress in 1947 sought to eliminate completely any requirement that the employee maintain full union membership."[25]

Significantly for our purposes, in *Pattern Makers* the Court recognized that a unit employee's views about membership in his union could change over time: "We think it noteworthy that Section 8(a)(3) protects the employment rights of the dissatisfied member as well as those of the worker who never assumed full membership. By allowing employees to resign from a union at any time, Section 8(a)(3) protects the employee whose views come to diverge from those of his union."[26]

Although *Pattern Makers* represents a landmark in the elucidation of employee rights under the Act, Section 7 rights do not end at the freedom to join, refuse to join, or resign from a union. These rights explicitly include the right to refrain from *assisting* a labor organization. Even when an employee has exercised his right to join a union, the right to choose whether to participate in or refrain from union activities includes the right to resign, as the Supreme Court recognized in *Pattern Makers*. Moreover, as the Court further recognized, Section 8(b)(1)(A) forbids unions from restraining or coercing an employee in the exercise of that right.[27] After *Communications Workers v. Beck*, supra, however, the right to refrain from assisting a labor union includes the right, for a nonmember subject to the requirements of a valid union-security clause, to decline to support union activities that are not germane to collective bargaining, contract administration, and grievance adjustment:

> Taken as a whole, Section 8(a)(3) permits an employer and a union to enter into an agreement requiring all employees to become union members as a condition of continued employment, but the "membership" that may be so required has been "whittled down to its financial core." *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963). The statutory question presented in this case, then, is whether this "financial core" includes the obligation to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment. We think it does not.[28]

When the Court concluded in *Beck* that Section 8(a)(3) "authorizes the exaction of only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues,'"[29] unions lost any authority to require from nonmembers payments beyond their fair share of the expenses described above. Thus, after *Beck*'s holding that a union's *expenditure* of such funds exceeded its statutory authority and constituted a breach of the duty of fair representation, no statutory basis for the involuntary *collection* of such funds from a nonmember who had registered an objection could exist.[30] Once

[23] *Pattern Makers*, 473 U.S. at 100–101.
[24] Id. at 106.
[25] Id. at 107 (citation omitted).
[26] Id. at 106.

[27] Subject to the proviso to Sec. 8(b)(1)(A): "*Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."
[28] 487 U.S 735, 745 (1988).
[29] Id. at 762–763.
[30] In *Beck*, the respondents' pleading presented the Supreme Court with the allegation that a union's expenditures of objectors' dues on nonrepresentational activities violated their constitutional rights, ran contrary to Sec. 8(a)(3), and breached the duty of fair representation. There was no allegation, nor could there have been in this context, that Sec. 8(b)(1)(A) had been violated; thus, the Court did not and could not consider the issues of restraint or coercion in the exercise of Sec. 7 rights. Indeed, as a statutory construction of the Act, the Court scarcely mentions Sec. 8(b)(1)(A); instead, the Court construed Sec. 8(a)(3), the provision called into question by the pleadings, and its proviso. It remained for the Board to find that union exaction of nonrepresentational monies from objecting nonmembers was a union unfair labor practice. See *California Saw & Knife*, supra.

Thus, I disagree with our dissenting colleagues that a union's use of a window period is compatible with Sec. 8(b)(1)(A). What is more, I find inapplicable their use of the duty of fair representation as the basis for their analysis of the window period issue, as applied to newly resigned employees or to any other class of employee. This is the same

a nonmember has informed his bargaining representative of his objection to paying dues to support nonrepresentational expenditures, the only lawful course open to the union is to recognize the objection and to give it effect as soon as it is received.[31]

Just as in *Pattern Makers*, in which the Court found that a union restrained and coerced employees in violation of Section 8(b)(1)(A) when it did not permit them to resign at any time without penalty, so a union's failure to recognize and give immediate effect to objections also violates Section 8(b)(1)(A). Neither the Act nor any Supreme Court cases justify permitting a union to postpone the effectuation of any nonmember's objection—for to do so is to permit a union to extract funds from a nonmember to which it is not entitled and to continue to deny to the employee his Section 7 right to refrain from assisting a labor organization by forcing the nonmember to pay for nonrepresentational activities over the nonmember's objection—or otherwise to penalize the nonmember.[32]

B.

My second basis for finding that a window period is coercive under Section 8(b)(1)(A) is that any overcharge after a nonmember has notified the union of his objection constitutes an unlawfully levied penalty, fine, or other exaction.[33] As discussed above, such charges are not part of the objector's membership obligation, as they exceed the financial core obligation as defined in *Beck*. Therefore, these overcharges, since they take money away from employees against their will and at the union's discretion, must then constitute a "fine or penalty" levied by the union under circumstances not permitted by the Act. A union violates Section 8(b)(1)(A), then, by collecting post-objection overcharges because Section 8(b)(1)(A) precludes unions from fining or disciplining employees who are not members and have not consented to the union's authority.

In *Pattern Makers*, the Supreme Court noted that "if [Section 8(b)(1)(A)'s] terms 'refrain' and 'restrain or coerce' are interpreted literally, fining employees to enforce compliance with any union rule would violate the

error, discussed above, that the Board in *California Saw & Knife* made when it conflated a *Pattern Makers* and a duty of fair representation analysis to strike down the window period at issue there.

Pattern Makers and the right to resign apply to *Beck* rights because where the financial obligations forcibly survive the end of formal membership where the employee has filed a *Beck* objection, the right to resign from, and not assist, a labor organization, is impeded because the employee is forced to continue to pay an overcharge—the equivalent of full union membership dues—or face the possible loss of employment. This, under Sec. 8(b)(1)(A) and *Pattern Makers*, is union coercion. This conduct, which amounts to forcing the objecting nonmember to assist the union, falls *outside* the bounds of Sec. 8(a)(3) and Sec. 8(b)(1)(A). It is erroneous to judge the conduct at issue here according to standards that the courts devised to evaluate whether a union's performance of its statutory obligations met a minimum standard. Rather, this conduct violates the statute's prohibitions, and it is properly evaluated in terms of an 8(b)(1)(A) "restrain or coerce" standard.

[31] As the Supreme Court stated in *Machinists v. Street*, 367 U.S. at 774:

> "Any remedies, however, would properly be granted only to employees who have made known to the union officials that they do not desire their funds to be used for political causes to which they object. The safeguards of [the RLA] . . . were added for the protection of dissenters" interest, but dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee. . . . Thus we think that only those who have identified themselves as opposed to political uses of their funds are entitled to relief.

[32] Until the Seventh Circuit Court of Appeals reconsidered the issue of a window period, 133 F.3d at 1017–1019, in affirming *California Saw & Knife*, no circuit court had issued an opinion on the lawfulness of a window period under the Act.

In *Nielsen v. Machinists Local 2569*, 94 F.3d 1107 (7th Cir. 1996), a case arising under Sec. 301, the court found "not unreasonable" the union's requirement that employees register objections in a month-long period each year. The court agreed with the union that a window period facilitates administrative and budgeting, and found that handling objections throughout the year would increase costs and difficulties. The court noted that "[l]ife is full of deadlines, and we see nothing particularly onerous in this one," and compared the window period to judicial filings: "When people miss the deadline for filing an appeal to this court, their rights can be lost forever, not just for eleven months, but that does not make time limits for filing appeals in violation of the law." Id. at 1116. With all due respect, I do not find this analogy persuasive. Courts are empowered by law to impose judicial filing deadlines, and they serve important public policy functions. There is no explicit enabling statute that empowers unions to establish window periods, and even if the court views them as private goods for the union, they play no role in the furtherance of public policy.

Likewise, in *Abrams v. Communications Workers,* 59 F.3d 1373, 1381–1382 (1995), arising under Sec. 301, the D.C. Circuit approved the union's use of a window period and its refusal to recognize continuing objections, finding that neither procedure is unduly burdensome to dues objectors. Regarding the window period, the court noted that "[t]he union, as well as the employees, have an interest in the prompt resolution of obligations and disputes. The . . . window period facilitates prompt resolution and leaves no doubt as to the timing of the requirement for making an objection." It is difficult to see how a window period would aid in the resolution of disputes over "obligations," which would appear to arise out of whether an objection had been filed, the proportion of chargeable to nonchargeable expenses, the adequacy of union notice to employees of their rights, or the quality of the information the union supplied. In fact, the notion that the window period would lessen the likelihood of disputes is premised on the assumption that the union's determination of whether an objection had been filed properly would always prevail.

In *Shea v. Machinists*, 154 F.3d 508 (1998), another RLA case, however, the Fifth Circuit, deciding a case arising under the RLA, rejected the union's defense of its annual renewal requirement and refusal to accept continuing objections, but distinguished the facts before it from those arising under the Act. The court held that under the RLA, "procedures [that limit an employee's Constitutional rights, such as the payment of dues under a union-security clause], be carefully tailored to minimize the infringement" on those rights. Id. at 504 (citation omitted). The court distinguished *Nielsen* and *California Saw & Knife* on the basis that those cases arise under the NLRA rather than the RLA.

Thus, neither *Nielsen*, *Abrams*, nor *Shea* did, or could, consider the theories set forth here based as it is on a violation of Sec. 8(b)(1)(A) of the Act, wholly apart from the duty of fair representation. "[A]s a general matter, neither state nor federal courts possess jurisdiction over claims based on activity that is 'arguably' subject to Section 7 or 8 of the NLRA." *Breininger v. Sheet Metal Workers Local,* 493 U.S. 67, 74 (1989).

[33] This analysis applies in cases in which an employee is bound by a valid union-security clause.

Act"[34]—but commented that it had held that Section 8(b)(1)(A) does not prohibit a union from disciplining members. See *NLRB v. Allis-Chalmers Mfg. Co.*,[35] *NLRB v. Granite State Joint Board,*[36] and *Scofield v. NLRB*.[37] The evolution of the Court's application of Section 8(b)(1)(A) and Section 8(a)(3), from *Allis-Chalmers* through *Beck*, shows that, while union internal autonomy remained important to labor policy, the Court curbed the absolute nature of union autonomy to accommodate employee freedom and self-determination as the Court further expounded the implications of Section 7.

In *Allis-Chalmers*, the Court held that a union had not violated Section 8(b)(1)(A) by fining members who had crossed the union's picket line and returned to work during a strike, and suing to collect the fines.[38] The Court noted that unions' almost legislative power over the affairs of represented employees and authority to regulate their internal affairs were significant elements in national labor policy after enactment of the Taft-Hartley Act.[39] The Court saw the intent of the Taft-Hartley Act as leaving with unions the authority to discipline members who quit a strike. It did not attribute to Congress an intent to limit "unions in the powers necessary to the discharge of their role as exclusive statutory bargaining agents by impairing the usefulness of labor's cherished strike weapon."[40] This reasoning, however, required the Court to balance Congress' equally prominent intent that Taft-Hartley safeguard represented employees against union autonomy.[41] To do so, the Court characterized the discipline of a member as an *internal* matter, and an attempt to affect an employee's employment as *external*.[42]

Thus, *Allis-Chalmers* and *Pattern Makers* represent two strands in modern NLRA law: the first, union internal autonomy, and the second, voluntary unionism, where employees are free to set their own relationship with their union, without compulsory membership or fear of job loss.

The Court began to reconcile these two strains in *Scofield v. NLRB* and *NLRB v. Granite State Joint Board*, both cases involving Section 8(b). *Scofield* involved the fining of union members who broke a union rule by exceeding a union-imposed production ceiling. The members filed charges with the Board, arguing that the union's attempt to collect the fines restrained and coerced them under the Act. In delineating the circumstances under which unions were privileged to discipline members, the Court interpreted *Allis-Chalmers* as "distinguish[ing] between internal and external enforcement of union rules and [holding] that 'Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status.'"[43] However, citing cases involving a union's rule that employees exhaust internal remedies before filing charges with the Board, the Court recognized that "it has become clear that if the rule invades or frustrates an overriding policy of the labor laws the rule may not be enforced, even by fine or expulsion, without violating Section 8(b)(1)."[44] The Court then held that "Section 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule."[45]

In *Scofield*, the Court found that the rule at issue satisfied each requirement. With respect to freedom to leave the union and escape the rule, the Court commented:

> If a member chooses not to engage in this concerted activity [the limit on production] and is unable to prevail on the other members to change the rule, then he may leave the union and obtain whatever benefits in job advancement and extra pay may result from extra work, at the same time enjoying the protection from competition, the high piece rate, and the job security which compliance with the union rule by union members tends to promote.[46]

Thus, an essential element in a union's authority to lawfully impose a penalty or fine on a represented employee is that the employee be a member, so that no employee is subject to union rules unwillingly. In *NLRB v. Granite State Joint Board*, the Court interpreted *Scofield* as

> indicat[ing] that the power of the union over the member is certainly no greater than the union-member contract. Where a member lawfully resigns from a union and thereafter engages in conduct, which the union rule proscribes, the union commits an unfair labor practice

[34] 473 U.S. at 101.
[35] 388 U.S. 175 (1967).
[36] 409 U.S. 213 (1972).
[37] 394 U.S. 423 (1969).
[38] 388 U.S. at 175.
[39] Id. at 179–183.
[40] Id. at 183.
[41] Id. at 184.
[42] The Court noted that "[f]ull union membership is not compelled by the [union-security] clauses: an employee is required only to become and remain a member of the Union . . . to the extent of paying his monthly dues." Id. at 196. While the court below relied on the nature of the union-security obligation to hold that unions could not fine members and seek enforcement in court, the Supreme Court, in reversing, assumed that the individuals at issue were full members and cautioned that "[w]hether [the Taft-Hartley] prohibitions would apply if the locals had imposed fines on members whose membership was in fact limited to the obligation of paying monthly dues is a question not before us and upon which we intimate no view." Id. at 197.
[43] *Scofield v. NLRB*, 394 U.S. at 428.
[44] Id. at 429. One of the cases, *NLRB v. Shipbuilders*, 391 U.S. 418 (1968), was decided by the Court, which agreed with the Board that employees must be free from coercion in making complaints to the Board. Id.
[45] Id. at 430.
[46] Id. at 435.

> when it seeks enforcement of fines for that conduct. That is to say, when there is a lawful dissolution of a union-member relation, the union has no more control over the former member than it has over the man in the street.[47]

In *Granite State Joint Board*, the Court struck down the union's attempt to enforce its rule against returning to work during a strike against employees who resigned and returned to work, where the union constitution contained no restrictions on resignation: "[W]e conclude that the vitality of Section 7 requires that the member be free to refrain in November from the action he endorsed in May and that his Section 7 rights are not lost by a union's plea for solidarity or by its pressures for conformity and submission to its regime."[48]

A union window period, as a unilateral restriction on behavior imposed by the union, is a union rule. Leaving aside whether the window period reflects a legitimate union interest, *Scofield* first inquires whether the window period—the rule that permits a union to continue to collect money for nonrepresentational purposes after a nonmember has objected—impairs any policy Congress has imbedded in the labor laws. It does, because the Supreme Court has interpreted Section 8(a)(3) as denying a union the right to expend such funds. *Scofield* then inquires whether the window period is reasonably enforced against union members free to resign from the union and escape the rule. Clearly it is not, as the very individuals against whom it is enforced are those who have already resigned and thus cannot escape the rule in any way. Under *Scofield*, then, a union cannot enforce a window period without violating Section 8(b)(1)(A).

Thus, Supreme Court interpretations of congressional intent in balancing union control over internal affairs against the right of employees to be free of coercion or restraint absolutely prohibit delay in the effectuation of *Beck* rights and the continued exaction of monies for nonrepresentational expenditures from nonmembers who have objected. To continue to do so is to "restrain or coerce" employees within the meaning of Section 8(b)(1)(A).[49]

[47] 409 U.S. at 217.

[48] Id. at 217–218.

[49] Further, I find no practical justification for a "window period." In *California Saw & Knife*, the union argued that to force it to accept objections throughout the year would cause serious accounting problems, as various sets of books would require changes. In this case, the union argues simply that a window period is orderly. It is notable that the union involved in *California Saw & Knife* accepted new *members* and their dues and initiation fees throughout the year, with no deleterious effect on its accounting system, despite the arguments of the union there that rolling acceptance of dues objections would be an accounting nightmare. Thus, as the same records that would need alteration for a nonmember's objection must also be changed for a new member's fees and dues, a genuine accounting need could not have motivated the window period in *California Saw & Knife*. In the case at hand, the Union does not argue that any negative consequences will follow the prompt processing of nonmembers' *Beck* objections; it only contends, in a perfunctory manner, that a neat and orderly system for processing objections is every bit as important as the need for accounting stability (which the judge had found would be the only justification for delaying processing objections). If the purpose of a window period is to satisfy a genuine accounting or administrative need, it would appear that the only union that could plausibly assert a window period for objections would be the union that limited the acceptance of new memberships to the same window of time. In that way, a union truly could count on a year that would be free of changes in various sets of books or difficulty in devising budgets (not alleged as issues in this case). Such a union would also avoid a charge that it discriminated against nonmembers by, as in the case of many unions that impose window periods, forcing them to wait for an open period to object and to renew their objections yearly, in favor of members, who need make their status known only once. But any union that is willing to put up with the uncertainty in the amount of income that it will receive through new initiation fees and membership dues cannot credibly assert that it cannot cope with the very small changes in income that a rolling acceptance of objections would entail.

IV.

I would also find that the majority errs in dismissing the allegations against the Respondent Employer for failing to accept the Charging Party's revocation of his dues-checkoff authorization. In this case, the Charging Party sent a copy of his resignation letter to his employer, accompanied by a cover letter revoking his dues-checkoff authorization. The Employer, Polymark, continued to deduct dues from Mohat's paycheck, but it stopped remitting them to the union, instead placing the dues in escrow. The majority reverses the judge and dismisses the allegation that the Employer violated Section 8(a)(1), (2), and (3) of the Act by refusing to accept Mohat's revocation. Based on the same principle of voluntary unionism expressed in both *Pattern Makers* and *Beck,* I would hold that, once an employee has resigned from the union, his agreement with the employer to deduct his union dues, unless his dues-checkoff authorization clearly states otherwise, is void.[50] While Section 302(c)(4) of the Act permits the negotiation of dues-checkoff agreements between employees and employers under certain circumstances, I would find that, in order to

[50] Mohat's dues-checkoff authorization reads in pertinent part:

> AUTHORIZATION AND ASSIGNMENT
>
> You are hereby authorized and directed to deduct from my wages my membership dues and initiation fee which shall be remitted by you to [the Union] in accordance with the applicable collective-bargaining agreement.
>
> This authorization shall be irrevocable until a date one year from the effective date hereof or until the date on which the current collective-bargaining agreement between my employer and [the Union] is terminated, whichever is earlier. I agree and direct that this Authorization and Direction shall be automatically renewed and shall be irrevocable for successive periods of one (1) year each from the effective date hereof, or for the period of each succeeding applicable collective-bargaining agreement . . . unless written notice of revocation by individual registered mail is given by me to my employer and [the Union], postmarked not more than twenty (20) days and less than ten (10) days prior to the expiration date of each one-year period, or the termination date of each applicable collective-bargaining agreement between my employer and [the Union], whichever is earlier.

survive resignation from the union, a dues-checkoff authorization must clearly waive the employee's right to refrain from assisting the union. Moreover, such authorization must not have been either obtained or maintained by fraud, manipulation, or coercion. Further, I would overrule *Schweizer Aircraft*, supra, to the extent it is inconsistent.[51]

In *Schweizer Aircraft*, which involved facts essentially on all fours with those in this case, the Board held that

> when an employee working under a contract with a union-security clause signs a checkoff authorization, the employee agrees to a particular method for paying whatever dues and fees can be lawfully required of him pursuant to the union-security clause. Under the terms of that clause, the employee remains obligated to make payments even after a resignation of membership and attempted checkoff authorization revocation. Under the terms of a checkoff authorization, the employee may be precluded from revoking his agreement to that method of payment, so long as the revocability restrictions are consistent with Section 302(c)(4).[52]

Former Member Cohen dissented, arguing that "membership" has a specialized meaning in a union-security clause, which it does not necessarily have in dues-checkoff authorization. He noted that union-security clauses and dues-checkoff authorizations are independent; that one could exist without the other; and that they involved agreements with different sets of parties: the union-security clause is an agreement between an employer and a union; and dues-checkoff authorization is an agreement between an employee and an employer.[53]

I agree with former Member Cohen. It is absolutely clear that, especially since *Marquez v. Screen Actors' Guild*, supra, which held in part that the word "membership" in Section 8(a)(3), carries with it the full gloss of Supreme Court interpretation, that "membership" in union-security clauses using that term has a limited and artful meaning. The same cannot be said for a dues-checkoff authorization, which is not mentioned in Section 7, in Section 8(a)(3), or in *Marquez*. Thus, I would read "membership" in a dues-checkoff authorization to mean full membership in a union. When Mohat informed his employer that he had resigned from the Union and that he no longer wished Polymark to withhold "my membership dues," Polymark's authorization to withhold them ended. While Mohat still may have had a financial obligation to the Union after his resignation, that obligation was not to pay "membership dues," and nothing in the statute or in the collective-bargaining agreement bound him to a particular method of satisfying that obligation or authorized the employer to enforce the union-security clause by collecting service fees through continued dues deductions.

In *Lockheed Corp.*,[54] the Board held that in the absence of a valid union-security clause, the language of a dues-checkoff authorization must show a clear and unmistakable waiver of the right to refrain from assisting a labor organization:

> We merely hold that the policy of "voluntary unionism" that informs the Supreme Court's decision in *Pattern Makers* with regard to remaining, or declining to remain, a union member also logically relates to other forms of union activity. . . . .If the employee did not agree, when he signed the authorization, to have "regular membership dues" deducted even when he is no longer a union member, then the employee's continued financial support of the union is not clearly "voluntary" after he has resigned.[55]

As noted above, then, I would apply the *Lockheed* Board's clear statement of the principles at issue in dues checkoff to all employees, including those covered by a valid union-security clause.

Thus, for the reasons stated above, I would find that the Union violated Section 8(b)(1)(A) by coercing Mohat in the exercise of his Section 7 rights, and that Polymark violated Section 8(a)(3) and (1) by refusing to accept Mohat's dues-checkoff authorization revocation.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT prevent employees in the Polymark Corporation collective-bargaining unit we represent who have resigned from the Union from filing objections to the payment of fees for expenditures of the Union not germane to the collective-bargaining process for a reasonable time after their resignations.

[51] The Board in *Schweizer* did not face the issue of the effect of *Beck* objections on dues checkoff. See 320 NLRB 528 at fn. 6.

[52] Id. at 532.

[53] Id. at 532–533.

[54] 302 NLRB 322 (1991).

[55] Id. at 328.

WE WILL NOT collect or attempt to collect fees from objecting nonmembers which are attributable to nonrepresentational expenses.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL recognize employee Robert Mohat as an objecting nonmember as of the effective date of his resignation.

WE WILL accept from Mohat the reduced dues and fees for the period he was or should have been a perfected objector.

WE WILL amend our policy to make it clear that employees who resign from the Union may file objections to the collection of fees for nonrepresentational expenses for a reasonable time after their resignation.

INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED MACHINE AND FURNITURE WORKERS, AFL–CIO

LOCAL 795 OF THE INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED MACHINE AND FURNITURE WORKERS, AFL–CIO

Carol L. Shore, Esq., for the General Counsel.
Bruce A. Hoffman, Esq. (Graydon, Head & Ritchey), of Cincinnati, Ohio, for Respondent Employer.
Robert Freidman, Esq., of Washington, D.C., for Respondent Union.
W. James Young, Esq., of Springfield, Virginia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. These cases were tried at Cincinnati, Ohio, on December 11, 1991. The charges were filed on December 4, 1990, against Polymark Corporation and International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO and its Local 795 (the Unions) by Robert J. Mohat, an individual. The complaint in Case 9–CA–28091 charges the Company with violations of Section 8(a)(1), (2), and (3) of the National Labor Relations Act (the Act) and the complaint in Case 9–CB–7783–1,–2, charges the Union with violations of Section 8(b)(1)(A) and (2) of the Act, for being parties to a collective-bargaining agreement that contains a union-security clause requiring employees to be members of the Union in good standing and for failing to reduce the financial obligation of Robert Mohat following his resignation from the union membership. The Respondents filed answers in which the jurisdictional allegations of the respective complaints were admitted and in which the substantive allegations of violations of the Act were denied.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs by the General Counsel, the Charging Party, the Company, and the Unions, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Company, Polymark Corporation, located in Cincinnati, Ohio, is engaged in the manufacture of heat seal transfers or silk screened emblems for the garment industry (Tr. 110). With sales of goods and products valued in excess of $50,000 directly to points outside the State of Ohio, Respondent Company is admittedly an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent Union, International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO, and its Local 795 (sometimes referred to as the Union) are admittedly labor organizations within the meaning of Section 2(5) of the Act.

Since at least March 9, 1981, the Union has been the exclusive collective-bargaining representative of Polymark's employees in the following unit:

> All production and maintenance employees, including inspection department, ink department, printing department, cutting department, art department, camera department, shipping and receiving department, maintenance department, stencil department and quality control department employees, employed by the Employer at its facility at Cincinnati, Ohio, but at no other geographical location, but excluding all office clerical and all professional employees, guards and supervisors as defined in the Act.

II. FACTS

The parties have been signatories to at least three collective-bargaining agreements, the most recent of which is effective from May 26, 1990, through May 25, 1993 (Tr. 111, G.C. Exh. 3). The first agreement in 1981 and all successive agreements have contained a union-security clause and a dues-checkoff provision providing as follows (G.C. Exh. 3, p. 39):

> *Section 1*. It shall be a condition of employment that all employees of the Company covered by this Agreement who are members of the Union in good standing on the effective date of this Agreement shall remain members in good standing and those who are not members on the effective date of this Agreement shall remain members in good standing and those who are not members on the effective date of this Agreement shall, on the sixty-first day following the effective date of this Agreement, become and remain members in good standing of the Union. It shall also be a condition of employment that all employees covered by this Agreement and hired on or after its effective date shall, on the sixty-first calendar day following the beginning of such employment, become and remain members in good standing in the Union. This provision is not applicable to part time or co-op employees.
>
> *Section 2*. Upon receipt of a duly executed authorization-assignment, the Company agrees to deduct from the pay all employees covered by this agreement all established monthly dues, initiation fees, and uniformly levied assessments of the Union. It is further agreed that the Company shall remit such deductions to the Union prior to the end of the month for which such deduction is made. All authorizations shall be voluntarily signed by the employees.

Robert Mohat, the Charging Party, was hired on November 4, 1986. During the interview with Dale Vollmer, the Company's president, Mohat was informed that he would have to join the Union after a probationary period of 60 days and that he would be expected to sign a dues-checkoff card (Tr. 31–32). Mohat eventually signed the checkoff authorization and has been a member of the Union since 1986 (Tr. 33, G.C. Exh. 9).

Prior to his resignation from the Union on November 9, 1990, Mohat attempted to obtain information about the Union's allocation of dues. In August 1990, a newspaper article about the Supreme Court's *Beck* decision[1] alerted Mohat to the practice of some unions, which use a percentage of their funds for political purposes (Tr. 37). He initially asked Sheila Madden, the union steward, for a breakdown of the union dues. Within a few days she provided him with the respective amounts going to the International and to the Local, but she was unable to obtain the figures apportioned according to their purposes (Tr. 37–38). In late August or early September, Mohat telephoned Edward Fire, the International's treasurer, with the same request. Fire was reluctant to disclose the information and suggested that Mohat submit a written request. In a letter of September 9, 1990, Mohat, referring to the *Beck* case, renewed his request as follows (G.C. Exh. 11, Tr. 40):

> Therefore, at this time I am making a formal request for a return of all dues not specifically used to cover the collective bargaining cost over the last 3 years 10 months. I also request that I be told immediately and *in writting* [sic] exactly what percentage of my union dues is needed and used exclusively to support the collective bargaining cost for my local 795.
>
> In conclusion as of this date Polymark Corporation has been informed that they are to withhold, from my pay check, only that percentage of my union dues nessary [sic] to support collective bargaining cost.

Fire denied the request for a refund of certain dues in a written reply of October 17, 1990, stating that the *Beck* case did not apply to a union member and that the Union "has an established procedure whereby a nonmember or agency fee payer may, during the month of April, request a reduction of the amounts he or she pays to the union for the period commencing the succeeding June through May of the following year" (G.C. Exh. 12, Tr. 41). Although the letter also indicated that this information had been publicized in the "I.U.E. News," Mohat testified that he had never received any issues of the Union's news (Tr. 33–35).

On October 22, 1990, Mohat approached Jim Henson, the Company's accountant, to inquire about the type of union membership an employee had to be to remain employed. Henson suggested that he talk to the company president. According to Mohat, Vollmer stated as follows (Tr. 44):

> He told me he had a closed shop, that the company—it was a Union shop and that you had to be a Union member to work there, but he had never been asked that question before about what a Union member meant.
>
> That he would have to direct that question to the company attorney and that he would get back with me on what that definition was.

Vollmer testified that he made no reference in his conversation to a closed shop and that he stated to Mohat that he "didn't know . . . nor was [he] familiar with the *Beck* Case. . . . [H]e would get back to him after [he] conferred with" his attorney (Tr. 112–113).

Mohat's testimony was consistent with that of Vollmer to the extent that the latter had expressed his unfamiliarity with the issue and that he needed to consult his attorney. However, contrary to Mohat's testimony, I find that Vollmer did not refer to his Company as a closed shop.[2]

In a letter to the Union dated November 9, 1990, Mohat declared his resignation as a member and informed the Union as follows (G.C. Exh. 13):

> Given that your contract with my employer states that you have unlawfully negotiated a "closed shop " provision with my employer, Article XXII of the collective bargaining agreement, I have serious reservations that you have a lawful agency shop agreement, and have this date ordered my attorney to file charges with the National Labor Relations Board to have your *per se* void and invalid "members only" clause stricken from the contract. You should receive these charges shortly.
>
> The United States Supreme Court's affirmance of the decision in *Communications Workers v. Beck,* 108 S.Ct. 2641 (1988), prompts me to object to the use of the money that I may be forced to pay to you for any purposes other than my pro rata share of the costs of collective bargaining, contract administration, and grievance adjustment for the unit of employees in which I am employed.
>
> Please see to it that might [sic] rights under *Beck* are put into effect immediately.

On the same day, Mohat sent a copy of the letter to his Employer stating as follows (G.C. Exh 15):

> Consistent with this resignation, I hereby revoke my dues-checkoff authorization. As you will note, this authorization only allows you to deduct monies from my pay for "membership dues and initiation fee." As I am no longer a member of the Union, I owe the Union no "membership dues."
>
> As you will note in my letter to the union's president, I have authorized my attorney to file a charge against the union for its negotiation and attempts to enforce an illegal "members only" clause. Should you attempt to discharge me for the exercise of my rights under § 7 of the National Labor Relations Act, I will have little choice by [sic] to authorize my attorney to do the same.

The Union responded by letter of November 19, 1990, which reminded Mohat that in spite of his resignation from the Union, he was "still obligated, under the union-security clause of the collective-bargaining agreement covering him, to continue to pay a sum equal to union dues." (G.C. Exh. 14.) With regard to any reduction in dues, the letter continued as follows:

> As I previously notified you in my letter of October 17, 1990, with respect to any *Beck* issue, there are established procedures whereby a non-member or agency fee payer may object, during the month of April, to the use of that portion of the amount you pay to the union which is

[1] *Communications Workers v. Beck,* 487 U.S. 735 (1988).

[2] Mohat appeared uncertain whether Vollmer said union shop or closed shop. I base my findings on Vollmer's unequivocal denial.

> not attributable to the union's representational activities, and request a reduction prospectively of the amounts paid to the union. The procedures will be publicized in the issue of the *IUE News* before April 1991 so that you may then timely raise you objection.

Mohat's testified as follows about the Company's response to his letter (Tr. 48–49):

> On that date, Jim Henson came to my press. I was already working and he mentioned receiving both letters of November 9th and that the company was going to continue to withhold Union dues from my paycheck because they had not received any authorization from the Union to reduce that amount by any percentage. . . . He also mentioned that this money would be put in an escrow account until the matter between me and the Union were settled and he also stated that probably—they thought they'd rather be sued by me than by the Union for a breach of contract that they had with the Union.
>
> . . . .
>
> On December 4, 1990, Mohat filed the unfair labor practice charge and, on December 12, 1990, the Union filed a grievance with Polymark protesting its failure to pay Mohat's union dues (R. Exh. 1, G.C. Exh. L (a)). The Company denied the grievance on December 11, 1990.

Analysis

Section 8(a)(3) of the Act provides in part:

> That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement.

Nevertheless, the General Counsel and the Charging Party argue that the union-security clause, requiring as "a condition of employment that all employees of the Company covered by this Agreement . . . become and remain members in good standing in the Union," is unlawful. Vollmer's response to Mohat's inquiry that employees had to belong to the Union is also alleged to have violated the Act, as is the Company's continued compliance with the checkoff provision in the contract and the Union's failure to reduce Mohat's dues to collective-bargaining costs following his resignation from the Union.

The primary support for this allegation is the recent decision in *Communications Workers v. Beck*, 487 U.S. 735 (1988), in which the Court held "that § 8(a)(3) . . . authorizes the exaction of only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees on dealing with the employer in labor management issues.'" Id. at 739. The Court thereby clarified its prior holding in *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963), which had decided that an "agency shop'' was a lawful alternative to a "union shop" or union security under Section 8(a)(3), and that union "'membership' as a condition of employment is whittled down to its financial core." Id. at 742. Accordingly, in spite of a union-security clause fashioned in accordance with the language in Section 8(a)(3), membership in a union may not be made a condition of remaining employed, although the employee can be required to pay union dues and fees. According to *Beck,* an employee cannot be required to pay *full* union dues or fees if a portion is expended by a union on "activities beyond those germane to collective bargaining, contract administration and grievance adjustment." This interpretation assures on the one hand that compulsory union membership is eliminated and, on the other, that employees sharing the benefits of the union's efforts pay their fair share and do not become "free riders." Applied to the instant situation, it is clear that Mohat was within his rights to resign from the Union in spite of the union-security clause, and that he was also justified in requesting that his union dues and fees be reduced insofar as they reflect expenditures in excess of representational costs. However, the issues are more complicated.

The union-security clause in this case does not reflect the precise language of Section 8(a)(3), nor does it explain the rights of employees to resign their membership under a union-security clause as explained above. Instead, the clause requires employees to become and remain members "in good standing." The parties agree that the Board deemed this language to be in conformity with the requirements of the Act in *Keystone Coat Supply Co*., 121 NLRB 880, 885 (1958). But the General Counsel submits that the Board erred in *Keystone* because the words "in good standing" are not found in the statute and because that decision conflicts with the holding in *Paragon Products Corp.,* 134 NLRB 662 (1961). The Board held in *Paragon* that a "clearly unlawful union security provision . . . is one which by its own express terms clearly and unequivocally goes beyond the limited form of security permitted by Section 8(a)(3) of the Act . . . which expressly require[s] as a condition of continued employment the payment of sums of money other than 'periodic dues and initiation fees uniformly required.'" Id. at 666. That decision does not conflict with *Keystone,* unless the term "in good standing" is interpreted as going beyond the requirements to pay periodic dues and fees uniformly required. As discussed by the General Counsel, that phrase has been interpreted as an indication that the employees had "no arrears in their dues obligation." *Hotel & Restaurant Employees Local 54 (Atlantis Casino),* 291 NLRB 989 (1988), enfd. 887 F.2d 28 (3d Cir. 1989). There, neither the Board nor the Third Circuit found the union-security clause requiring employees to "become and remain members in good standing" to be unlawful even though the case contained a discussion of financial core members under the *General Motors* case. In other cases, which arose subsequent to the *General Motors* case, the Board has upheld union-security clauses requiring membership in good standing. *California Blowpipe & Steel Co.,* 218 NLRB 736 (1975); *Hayes Coal Co.,* 197 NLRB 1102 (1972). It is accordingly clear that the Board, having initially approved the union-security clause of the type at issue here in *Keystone,* has never invalidated such a provision following the *General Motors* decision in 1963, nor did the Court in that case invalidate the union-security clause provision, in spite of the holding that the clause does not exactly mean what it states—so long as employees pay the core dues and fees, they do not have to be union members.

Turning now to the more recent decision in *Beck,* it is initially clear that the case did not overrule any prior holdings, nor did it outlaw union-security agreements. To the contrary, the Court stated that, taken "as a whole, § 8(a)(3) permits an employer and a union to enter into an agreement requiring all employees to become union members as a condition of employment," but it explained "membership" and defined the minimum or "financial core" obligation of an employee under such

a proviso as only those dues or fees "germane to collective bargaining, contract administration, and grievance adjustment." Does that holding, finding "union membership" lawful, invalidate on its face a security clause requiring membership "in good standing?" It has long been established that "the assessments that may be lawfully imposed [under a union-shop provision] do not include 'fines and penalties.'" *Railway Employees Dept. v. Hanson,* 351 U.S. 225, 235 (1956). So long as the phrase "in good standing" is interpreted to exclude an employee's responsibility for fines or penalties under internal union rules, the union-security proviso appears to be lawful. Indeed, the phrase may have a salutary purpose by reminding employees to make their payments for lawful dues and fees promptly and periodically, because a delay or a lapse of such payments could subject them to discharge. *Larkins v. NLRB,* 596 F.2d 240 (7th Cir. 1979). As pointed out by the General Counsel, the Board recently construed that language to require prompt payment of personal dues. *Hotel & Restaurant Employees Local 54 (Atlantis Casino),* supra. The Board may, of course, revisit the issue at its discretion but, considering the prior interpretations of the phrase, it is my view that the *Beck* decision does not mandate a different result. The misleading or deceptive nature, if any is the word "membership" and to a lesser extent the term "in good standing." The decision in *Beck* does not resolve that issue more precisely than *General Motors*. Even though the union-security clause cannot be enforced as written, I find that it is not unlawful on its face, but that it must be interpreted in accordance with applicable law. I would therefore dismiss the allegations that the Union and the Company violated the Act by maintaining the union-security clause.

The alleged threat. The allegation that Vollmer violated the Act by threatening Mohat with loss of employment must be dismissed. Vollmer stated that "Mohat had to be a union member to work there," but he also expressed his own uncertainty, first by questioning "what a union member meant" and secondly by indicating that he would have to consult with this attorney for a proper definition. Contrary to General Counsel's suggestion, Vollmer did not imply that Mohat had no choice but to be a full union member. Vollmer essentially said that he did not know the answer and even suggested that union membership may not necessarily mean what the security clause provides. Under these circumstances, I find that such comments could not be interpreted to have a tendency to coerce or to interfere with an employee's Section 7 rights.

The Employer's failure to honor the checkoff authorization. The complaint's allegation that Respondent Polymark Corporation refused to honor Mohat's checkoff revocation is supported by the record. Pursuant to the union-security and checkoff provision in the collective-bargaining agreement, employees execute a written checkoff authorization (G.C. Exhs. 3, 9). By letter of November 9, 1990, Mohat informed the Company that he had resigned his membership in the Union and stated, "[C]onsistent with this resignation, I hereby revoke my dues check off authorization." (G.C. Exh. 15.) The Company orally informed Mohat that it would continue to deduct union dues but place the funds into an escrow account.

Mohat's checkoff authorization does no contain any explicit language setting forth an obligation to pay dues even in the absence of union membership. Instead, the authorization shows unequivocally that the funds are a quid pro quo for union membership. Under these circumstances, it is clear that Mohat's authorization permitting his employer to deduct union dues must be construed to include only that period during which he is a member. *Electrical Workers IBEW Local 2088 (Lockheed Space Operations)*, 302 NLRB 322 (1991). The Employer should have honored Mohat's revocation. *Washington Gas Light Co.,* 302 NLRB 425 (1991). I find that its failure to do so violated Section 8(a)(1), (2), and (3) of the Act.

The Unions' refusal to honor Mohat's reduction of union dues. The record shows that the Union did not reduce Mohat's dues following his notice of resignation, nor did the Union advise Mohat that he was required for continued employment to pay for only those dues and fees relating to representation purposes. This conduct is alleged as a violation of Section 8(b)(1)(A) and (2) of the Act.

Mohat had repeated his verbal requests for a breakdown of the dues structure, with a written request, dated September 9, 1990, and also demanded that all dues not related to collective bargaining be returned. The Union responded stating that only a nonmember could make such a request and referred to a procedure published in IUE News notifying employees that requests for reduction in dues may only be made annually during the month of April. On November 9, 1990, Mohat notified the Union of his resignation and demanded his *Beck* rights. The Union again referred to its established policy, stating that the procedure would be published in the forthcoming issue of IUE News.

The record contains page excerpts from the February 1989 and the March 1990 IUE News (G.C. Exh. 8(a)(b)). On pages 10 and 8, respectively, a boxed notice appears under the heading "Notice to Agency Shop Fee Payers." The notice explains a procedure to those employees who desire a reduction in their union obligations "based on union expenditures for noncollective bargaining matters." By stipulation, the record also contains representative samples of letters designed for "agency fee objectors" (Tr. 16–17, G.C. Exh. 7(a), (b), and (c)). These letters contain a breakdown of the union dues and also explain a procedure available to employees who want to challenge the calculations used in the breakdown of the dues structure. The Union's practice in this regard should meet the criteria established in *Chicago Teachers v. Hudson*, 475 U.S. 292 (1986), and *Crawford v. Airline Pilots*, 870 F.2d 155, 160 (4th Cir. 1989).

The General Counsel did not challenge the adequacy of the notices in the IUE News, nor the breakdown of the union dues, nor the procedure to challenge the breakdown of the dues. The record shows that Mohat never received this material. Accordingly, the General Counsel submits that presented is "a question of first impression as to when an employee who has resigned his/her membership and raised a *Beck* objection must be accorded a reduction in fees."

The law is clear that a union must recognize the right of an employee to resign his or her membership from the union. *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985). The only aspect of union membership that may lawfully be required as a condition of employment is the payment of dues, which, according to *Beck,* are those germane to collective bargaining, contract administration, and grievance adjustment. Mohat's resignation from the Union and the demand for his *Beck* rights, obligated the Union to honor his request. While the Union acknowledged his resignation, it failed to reduce his financial obligation and, instead, referred him to a future time, namely, the month of April when he could renew his request. In short, the Union's position is that a member's request can only be

made annually during the month of April. Such a policy conflicts with the rights of a union member to resign his membership. *Pattern Makers,* supra*; Machinist Local 1414 (Neufeld Porsche-Audi),* 270 NLRB 1330 (1984). The only argument against a union's prompt compliance with an employee's *Beck* rights would be the practicality of responding to numerous requests or the complexity of accounting procedures if many requests are received at different times. There is no such a showing in the record. Accordingly, the obligation on the part of the Union to notify employees within a reasonable time, certainly on a monthly basis, would not be prohibitive. For example, Mohat's November resignation should have been honored by a reduction of his December dues. I accordingly find that the Union's failure to advise Mohat within a reasonable time of his rights and the failure to reduce his dues interfered with his Section 7 rights in violation of Section 8(b)(1)(A) and (2) of the Act.

CONCLUSIONS OF LAW

1. Respondent Company, Polymark Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent Unions, International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO, and its Local 795, are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent International and Respondent Local are agents of each other within the meaning of Section 2(13) of the Act and joint ventures in the conduct described herein.

4. Respondent Unions have been the collective-bargaining representative of the employees of Polymark Corporation in the following unit:

> All production and maintenance employees, including inspection department, ink department, printing department, cutting department, art department, camera department, shipping and receiving department, maintenance department, stencil department and quality control department employees, employed by the Employer at its facility at Cincinnati, Ohio, but at no other geographical location, but excluding all office clerical employees and all professional employees, guards and supervisors as defined in the Act.

5. Respondent Unions violated Section 8(b)(1)(A) and (2) of the Act by failing and refusing to reduce an employee's financial obligation under a union-security clause, after his resignation from the Union, to the pro rata share of the cost of collective bargaining, contract administration, grievance adjustment, and other representational costs.

6. Respondent Unions violated Section 8(b)(1)(A) and (2) of the Act by failing to advise an employee, who had inquired about his rights under a union-security clause, that the only condition of employment is the payment of dues and fees relating to representational purposes.

7. Respondent Polymark Corporation violated Section 8(a)(1), (2), and (3) of the Act by failing and refusing to honor an employee's checkoff revocation after the employee's notice of his resignation from the Union.

8. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent Unions and Respondent Employer have engaged in unfair labor practices, I recommend that they be ordered to cease and desist therefrom and to take certain affirmative actions necessary to effectuate the purposes of the Act.

Respondent Unions will be required to honor requests for reductions in dues pursuant to *Communications Workers v. Beck,* 487 U.S. 735 (1988), promptly and within a reasonable time not to exceed 30 days from the date of resignation and to promptly inform employees who make inquiries of their rights under the union-security clause. The Union will accept from Mohat the reduced dues and fees as of the effective date of Mohat's resignation as a union member.

Respondent Polymark Corporation will be ordered to honor the employee's written revocation of the checkoff authorization and to refund with interest to the employee all dues and fees collected after revocation of the checkoff authorization, enabling Mohat to pay to the Union those dues and fees, past and present, which represent the representational expenses as defined by the *Beck* decision. The refunded amounts shall include interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]